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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case on July 20, 1956.

OPINIONS BELOW

The opinion of the District Court (R. 20a–29a) is not officially reported (12 WH Cases 498). The opinion of the Court of Appeals (App. A, *infra,* pp. 23–31) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1956 (App. A, *infra,* pp. 31–32). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the 1949 Amendments to Section 7 of the Fair Labor Standards Act were intended to expand the application of the *Belo* decision (*Walling* v. *Belo Corp.*, 316 U. S. 624) and to overturn this Court's other decisions which held that *Belo* was limited to agreements setting a bona fide realistic and actually operative rate, and that the Act did not permit the fixing by agreement of a wholly fictitious hourly rate completely unrelated to the pay actually and normally received by the employee for ordinary non-overtime hours.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*), are printed in full in Appendix B, *infra,* pp. 33–37.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime requirements of the Act (Section 7). The charges of violations arose out of respondent's pay practices under "individual contracts" with approximately 600 of its employees working as insurance inspectors in respondent's 19 branches throughout the country. Respondent claims that the "contracts" in question are guaranteed weekly salary agreements in conformity with the terms of Section 7 (e), App. B., *infra,* p. 36.

1. Respondent is a Connecticut corporation engaged in the business of casualty insurance on steam boilers, pressure vessels and machinery of various types (R. 21a). Its principal place of business is in Hartford, Connecticut, and it has 19 branch offices located in large cities throughout the country (R. 13a). From 15 to 60 inspectors are employed at each of these branches, totaling approximately 600 (*Ibid.*). Prior to the enactment of the 1949 Amendments to the Fair Labor Standards Act the inspectors were employed at flat monthly salaries without regard to their actual working hours, and respondent, relying on its claim that the inspectors were exempt "administrative" employees under Section 13 (a) (1), made no pretense of compliance with the overtime requirements of the Act.[1] Respondent was definitely advised

[1] Section 13 (a) (1) exempts employees employed in a "bona fide executive, administrative, professional * * * capacity * * * (*as such terms are defined and delimited by regulations of the Administrator*)" [emphasis added]. The Administrator's regulations issued pursuant to this Section (29 CFR Part 541) prescribed five *conjunctive* requirements to qualify for "administrative" exemption, the following three of which are particularly pertinent to respondent's inspectors: (1) that the compensation be at a rate of not less than $75.00 per week, (2) that the employee's "primary duty" consist of performance of office or non-manual field work directly related to management policies or general business operations, and (3) that not more than 20 percent of the employee's weekly hours be devoted to activities which are not of an administrative character. During 1950 and 1951 a large proportion of respondent's inspectors did not meet the basic $75.00 salary requirement and respondent admitted that, even at the time of the pendency of this case on appeal, some of the inspectors still did not meet this requirement. In addition, the trial court in this case held the exemption inapplicable on the

by the Administrator in November 1948 that the inspectors did not meet the conditions which would qualify them for the "administrative" exemption (Transcript of evidence, pp. 11, 14). Although still claiming the exemption despite the Administrator's ruling, respondent apparently concluded that the same result could be obtained by using Section 7 (e) agreements (Tr. p. 12).

2. Shortly after the enactment of the 1949 Amendments, respondent executed with each inspector, separately, a standard form of agreement (R. 9a) which specified a "regular rate" of at least 75 cents an hour for the first 40 hours of work in any workweek and one and one-half times that rate for all hours worked in excess of 40, with a "guarantee" of "pay for 60 hours of work per week based on the rate specified," and which stated that the guaranteed pay would amount to a specified sum "per month" to be "paid twice a month on the Company's regularly established

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basis of findings of fact that none of the inspectors met the other two above-stated requirements (R. 21a, 24a–25a). These findings were supported by abundant evidence, and respondent did not cross-appeal.

Respondent may attempt, as it did in the Court of Appeals, to defend the judgment below on the ground that the inspectors were exempt, despite the District Court's ruling, under the "administrative" exemption. However, since the undisputed evidence shows that almost half of the inspectors had been receiving weekly salaries of less than $75.00, and even as late as the time of appeal respondent was admittedly paying some of them less than the requisite salary, the "administrative" exemption defense cannot support a judgment dismissing, in its entirety, a complaint which included all the inspectors, and not only those who were being paid the prescribed rate.

paydays" (R. 9a–10a). Along with the proposed agreement, respondent sent each employee a form letter explaining that it was proceeding pursuant to the Fair Labor Standards Amendments of 1949 and that the agreement "will assure you a guaranteed salary at least equal to that which you have been receiving or which has been agreed upon" (R. 11a).

To arrive at the "guarantee" and the hourly rate specified for each employee, respondent "translated the salary which they had been receiving to an hourly rate for 40 hours which, with time and a half for all time over 40 hours up to 60 hours, would give them the approximate salary, at least as much, if not a little more than the salary which they had been receiving and to which they had previously agreed." (See testimony of respondent's attorney, Secretary and Treasurer, Transcript, pp. 13–14.) The hourly rate and the "guarantee" for each employee was computed by taking the monthly salary he had previously received and translating that into a weekly "guarantee"[2] from which an hourly rate was then mathematically calculated on the basis of an assumed 60 hour workweek. This meant, of course, that the hourly rate had to be reduced to a figure small enough so that the "guarantee" would include "overtime compensation" for 20 hours per week. Although the actual hours required

[2] For example, the weekly "guarantee" of an employee previously paid $300 per month would be determined by multiplying by 12 months ($3,600) and dividing the results by 52 weeks which would give $69.24. The weekly guarantee might be slightly increased to a flat $70.00 as indicated in the illustration in the text *infra*, p. 13.

for the job differed radically from region to region and from inspector to inspector, the agreements were based on an assumed workweek of 60 hours indiscriminately for each of the inspectors, without regard to the hours actually worked by any of them.

3. In actual fact, most of the inspectors never exceeded or worked anywhere near 60 hours a week. As the trial court found, over a two year period the total number of weeks in which 60 hours was exceeded amounted to not more than one-fourth of one percent of all of the weeks worked (R. 20a). Since the total number was only 135 weeks out of approximately 58,000 man weeks (R. 5a), it is evident that well over two-thirds of the inspectors *never* exceeded 60 hours. A glance at the chart for all of the branch offices (R. 13a) shows that in many of the branches an actual workweek equalling 60 hours was almost as rare.[3]

The trial court also found (although obviously on the basis of only a rough estimate) that the inspectors' hours of work "typically" fluctuated "between 35 and 50 hours" (R. 20a). While a few inspectors in *some*

[3] In the Hartford branch where 32 inspectors were employed, no one ever exceeded 60 hours and there were *only two weeks* and *one week*, respectively, in which anyone worked as much as 60 hours. In the Los Angeles office where 18 to 20 inspectors were employed, there were *no* weeks exceeding 60 hours and a total of *only eight* and *three weeks* in 1950 and 1951, respectively, in which any employee worked as much as 60 hours. In the Chicago branch (which is the largest branch), with from 55 to 60 inspectors, there were only five workweeks in 1950 and *one* week in 1951 in which 60 hours was exceeded, and only nine and four weeks, in 1950 and 1951, respectively, in which anyone worked as much as 60 hours—a total of only 19 man-weeks, over the entire two year period, in which as much as 60 hours was worked in that branch.

of the branches may have frequently worked as much as 50 hours, the undisputed evidence shows that a large proportion of them rarely, if ever, worked in excess of 44 hours per week, and indeed that some of them rarely, if ever, worked more than 40 hours a week. This is illustrated by the chart for the Hartford branch (exhibit 3, R. 14a), which shows that over 93% of the total number of workweeks in 1950, and about 95% in 1951, were not in excess of 50 hours, and that 74% in 1950, and 78% in 1951, were not in excess of 44 hours, and that about 50% during the two years were not in excess of 40 hours.

The charts showing the average workweek of each individual inspector in the Hartford branch over the two year period (exhibit 4, R. 14a–17a) corroborate the fact that most of them rarely, if ever, had occasion to work more than 44 hours a week, and also show that the actual working hours differed substantially from individual to individual inspector. During 1950, the average workweek of different inspectors ranged from a low of 30.6 (employee Bilous) to a high of 50.2 (employee Fennessey)—an average difference of almost 20 hours a week (R. 16a). For the combined two years (R. 14a–15a), the average workweek of individuals ranged from a low of 31.7 hours (Bilous) to a high of 48.9 (Fennessey). During the combined two-year period, only 19 out of the 43 inspectors—less than half—worked an average workweek over 40 hours, only 8 of these worked an average over 42 hours, only 5 worked an average of over 44 hours and only 3 worked an average workweek over 46 hours,

with a single employee working as high as 48.9 hours, and none working as much as an average of 50 hours.

Nevertheless, all of these inspectors were regularly paid their semimonthly salaries supposedly for work-weeks of 60 hours, with a proportionate amount of their salaries arbitrarily labelled "overtime" compensation for 20 hours, whether they ordinarily worked no overtime at all, or worked no more than two to four hours overtime, or whether they frequently worked from six to ten hours of overtime, and despite the evident fact that in the normal course of the business their jobs rarely, if ever, required as many as 10 hours of overtime, much less 20 hours.[4]

REASONS FOR GRANTING THE WRIT

This case presents basically the same issue as in *Mitchell* v. *Brandtjen & Kluge, Inc.*, pending on petition for a writ of certiorari, No. 86, this Term. The reasons for granting review of this issue are quite fully set forth in our petition and reply memorandum filed in No. 86. The reply memorandum, having been filed subsequent to the Second Circuit's decision in the instant case, includes most of the grounds supporting the grant of the writ in the instant case. We there-

[4] A total of only 112 man weeks in 1950 (for 33 inspectors), and only 83 in 1951 (for 32 inspectors), exceeded 50 hours. (R. 13a, 14a). This would be an average of about two to three weeks per year per inspector, although, of course, many of the individual inspectors never worked as much as 10 hours overtime and therefore would not share the 112 weeks. Assuming that, for the most part, only a few individuals shared these 112 weeks, it is evident that at least two-thirds of the individual inspectors could have had little, if any, occasion to work more than 10 hours of overtime.

fore respectfully refer the Court to the petition and reply memorandum in No. 86 instead of repeating the grounds there discussed. Here, we shall only summarize these grounds with a view to emphasizing additional factors particularly applicable to the instant case.

I

In summary, the reasons advanced for the granting of the writ in No. 86 are as follows:

1. The decisions of the First and Second Circuits reduce the "bona fide" and "regular rate" requirements of Section 7 (e) to mere artificial and fictitious formalities, contrary to this Court's decisions prior to the 1949 Amendments (Pet. 10–13; Reply 3–4).

2. The ruling that Section 7 (e) is "self-sufficient" and eliminated this Court's post-*Belo* rulings is erroneous; it is contradicted not only by the very terms of Section 7 (e) but by the specific statutory provisions of other pertinent integrated amendments to Section 7—particularly the comprehensive definition of the term "regular rate" in 7 (d)—the applicability of which appears to have been overlooked by the circuits; it is also, significantly, contrary to the generally accepted understanding of the effect of Section 7 (e) immediately following its enactment (Pet. 12–16, 18; Reply 13–24).

3. Instead of considering the text and context of the pertinent amendments themselves, the circuit decisions rested primarily upon erroneous suppositions as to the legislative background against which the 1949 Amendments were enacted—suppositions which ig-

nored a most significant factor in that legislative background, *i. e.*, the prevalent and widely shared concern about the potentialities for abuse of *Belo*-type agreements if given unrestricted range, a concern voiced not alone by Department of Labor officials and labor representatives, but repeatedly by this Court's decisions to which Congress undeniably gave careful attention in drafting the amendments to Section 7 (Pet. 16–18; Reply 8–13).

4. The circuit court decisions are also premised on the mistaken assumption that the "regular weekly income" objective of Section 7 (e) would be impossible of attainment if employer and employee were not allowed unrestricted flexibility to fix arbitrary hourly rates without regard to employment actualities or to the basic statutory overtime policy. Contrary to this assumption, there is ample flexibility for wage agreements which provide a stable weekly salary "related, fairly, and not evasively, partly to regular hours of work and partly to overtime" (cf. concurring opinion of Mr. Justice Frankfurter in *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 433), within the limitations—such as we believe are imposed by Sections 7 (d) and (e)—designed to restrain abuse of wage agreements for purposes other than the attainment of the legitimate objective of wage stability (Reply, 24–28).

5. The importance of the issue is not only attested by this Court's pre-1949 decisions which emphasize that the "regular rate of compensation" is the "keystone" of the statutory overtime policy, but its sig-

nificance has greatly increased because of the widespread use in recent years of *Belo*-type agreements for thousands of employees, including almost every conceivable type and variety of worker who has occasion to work any substantial amount of overtime. The First and Second Circuit decisions discard the basic principles which had imposed reasonable restraints upon such agreements and which might have averted the outpouring of wholly artificial and evasive wage schemes that can now be expected to threaten practical nullification of the fundamental statutory overtime policy. This Court has not yet passed upon any overtime issues under this Act since the extensive amendments in 1949, and the issue presented by these cases is so crucial to the basic overtime policy of the Act that its determination should be settled by this Court (Pet. 18–20; Reply 3–8).

II

The facts of this case highlight the extent to which the First and Second Circuit decisions reduced the statutory terms "bona fide individual contract" and "regular rate" to meaningless formalities. As is evident from the testimony of respondent's own officer and attorney (see the Statement, *supra*, pp. 4–5), the wage agreements here have little, if any, relation to the objective of insuring employees a stable weekly salary, for they were receiving virtually the same regular salary prior to the execution of these agreements. This testimony, also, goes far toward showing that respondent's sole objective was to avoid the over-

time requirements just as completely as if its claim of the "administrative" exemption for inspectors had been allowed. While respondent might reasonably claim that the previous weekly salaries of *some* of the inspectors were intended to compensate for *some* overtime, this claim could not be substantiated at all for a large number of the 600 individuals involved, and it most certainly could not be substantiated for anything approaching 20 hours of overtime for the great majority.

From the manner in which the terms of the agreements were determined, it is apparent that the contract "regular rate" was computed "in a wholly unrealistic and artificial manner," with "no effort to base the regular rate upon the wages actually received or upon the hours actually and regularly spent each week in working," and that it "did not represent the rate which was actually paid for ordinary, non-overtime hours," and was "not in fact the regular rate under any normal circumstances" (*Walling* v. *Helmerich & Payne*, 323 U. S. 37, 41–42; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 424–426; see Reply in No. 86, pp. 12, 17). Instead, respondent, on a greatly exaggerated and more extreme scale, followed the same artificial and evasive scheme described in our reply memorandum in No. 86 (pp. 18–20). Since the agreements in the instant case are so much more extreme in their unreality, the inconsistencies with specific statutory requirements and the destructive impact upon the basic overtime policy can be better appreciated by illustrations based on the facts of this case.

As pointed out in the Statement (*supra*, pp. 7–8), a large proportion of the inspectors rarely, if ever, worked in excess of 44 hours. An illustration will show how respondent's 60 hour agreement with such an employee, far from imposing any "financial pressure" to spread employment in times of recession, operates as an inducement to increase and aggravate any chronic unemployment problems that may arise (cf. Reply in No. 86, pp. 26–28). Such an employee may have previously received a monthly salary which averaged $69 per week. Since he was paid this amount regularly for workweeks which in the normal course of the business have not exceeded 44 hours, he would actually have been receiving a regular hourly rate of at least $1.50—$60.00 for 40 hours straight time ($1.50 x 40) plus $9.00 for 4 hours of overtime ($2.20 x 4), a total of $69.00. Under respondent's present agreement, this employee might be guaranteed $70.00 for a workweek of 60 hours, with a reduction of his hourly rate from $1.50 to $1.00, and a corresponding reduction of his overtime rate of $1.50, instead of $2.25—$40 for 40 hours straight time ($1.00 x 40 hours) plus $30 for 20 hours "overtime" ($1.50 x 20 hours), a total of $70. Thus, respondent is enabled to avoid any cost whatsoever for 16 additional hours of overtime per week and to cut the cost of any overtime in excess of 60 hours down to the *actual* regular rate of $1.50. In this way, the employer can actually save $36.00 ($2.25 x 16 hours) on any occasion that he may wish to call on the employee to work 60 hours, or he can save $24 ($1.50 x 16 hours) that he might have to

pay another employee at the actual straight-time rate.[5]

It is evident that, under such agreements, respondent has not included in the specified "regular rate" a substantial part of the remuneration actually and regularly paid for the inspectors' normal non-overtime working hours, as specifically required by Section 7 (d). See the Reply Memorandum in No. 86, pp. 15–21. The agreements have excluded from the contract "regular rate" not merely "payments made for occasional periods when no work is performed" (to which the exclusion in Section 7 (d) (2) is limited), but have excluded substantial payments regularly made, supposedly for 16 or more unworked hours. Even in the case of the inspectors who may have frequently worked more than 44 hours, it is plain that in most of such cases the contract "regular rate" excluded payments regularly received, supposedly for at least 10 unworked hours. Thus, the agreements clearly do not meet the "regular rate" requirement of Section 7 (e), if, as the plain statutory terms provide (see Reply in No. 86, p. 14), the definition in Section 7 (d) is applicable. And, if the term "bona fide individual con-

[5] While this illustration does not precisely correspond to the situation of any particular employee, it is close enough to an actual situation fairly to reflect the effect of the agreements with the large proportion of inspectors who rarely, if ever, have worked in excess of 44 hours per week. Because the figures for particular individual employees are not in the record, and also in order to simplify the mathematics, we have used hypothetical rather than actual figures. The evidence in the record, although it does not include specific figures for particular employees, does show the frequency of weekly hours worked at various levels and the average workweeks of particular employees, at the Hartford branch (Exhs. 3 and 4, R. 14a–17a).

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tract" has any real meaning, it is equally evident that this requirement of Section 7 (e) has not been met by respondent's agreements. For the indiscriminate, arbitrary allocation of a portion of the weekly salary to 20 hours of "overtime," despite the wide differences in the actual working hours of these 600 individual employees, was not done on any "bona fide individual" basis.

III

The wage agreements in the instant case, unlike those in *Brandtjen,* No. 86, which were 48 hour agreements, employed the maximum 60 hours limitation provided by Section 7 (e) (App. B, *infra,* p. 36). Thus, this case presents a question not specifically ruled upon by the *Brandtjen* decision, *i. e.,* whether the 60 hour proviso was intended to validate any agreement, however fictitious and however unnecessary for the attainment of the objective of a regular weekly income, as long as the agreement was kept within 60 hours—or, as we believe, was simply intended as an additional limitation upon agreements setting bona fide, and actually operative, regular and overtime rates.

While the First Circuit in *Brandtjen* did not specifically rule on this question, the decision below was the logical outcome of the First Circuit's ruling that the "bona fide individual contract" and the "regular rate" requirements of Section 7 (e) are "self-sufficient" and are satisfied by the mere formality of specifying an hourly rate mathematically consistent

with the amount of the weekly guarantee and the number of hours arbitrarily assumed. The effect of this interpretation of Section 7 (e) is, of course, an open invitation to agreements arbitrarily allocating the weekly salary to the maximum of 60 hours, regardless of the actual range of irregularity of hours necessitated by the work—whether the actual fluctuation is usually only between 32 and 42 hours (as it appears to have been in *Brandtjen*), or only up to 44 (as was evidently the case with a large proportion of the inspectors in the instant case), or between 20 and 100 to 150 (as was the case in *Walling* v. *Halliburton Co.*, 331 U. S. 17).

This interpretation of the 60 hour proviso obviously cannot be rationalized on the basis of the limited objective of Section 7 (e) to make possible a regular weekly salary where the employee's duties "necessitate irregular hours of work." For it is quite unnecessary, for purposes of providing a regular weekly salary for hours of work which do not usually fluctuate above 42 or 44 hours, to assume that the weekly salary covers 60 hours.[6] As pointed out in our Reply

[6] If a wage agreement may in effect convert the 40 hour workweek standard into a 60 hour standard before any true overtime compensation is paid, *regardless of the degree of fluctuation* of hours necessitated by the work, the 40 hour workweek standard would be virtually abolished. For, as pointed out in petitioner's reply memorandum in No. 86 (pp. 6–7), virtually every conceivable type of worker who has occasion to work any substantial overtime, can easily qualify as an employee whose "duties * * * necessitate irregular hours of work." That Congress did not intend to thus abolish the 40 hour workweek standard is not only evident from its persistent adherence to the standard through

in No. 86 (pp. 24–28), it is possible and practicable for the employer to adapt the weekly wage, "fairly and not evasively," to the actual fluctuations in working hours required by the usual course of his business. And this, we submit, is what is required by the terms of Section 7 (e) and the other related integrated amendments to Section 7, as well as by the legislative intent to restrict abuse of such agreements for purposes other than the legitimate objective (see Reply in No. 86, pp. 13–28).

The legislative background also indicates that the 60 hour proviso was designed, not as an invitation to fictitious and evasive agreements, but rather to impose a further limitation on an otherwise valid *Belo*-type agreement. The attention of Congress had been called to this Court's decision in *Halliburton, supra,* upholding the validity of a *Belo*-type agreement which provided a weekly guarantee covering *84 hours* for oil field employees whose hours fluctuated to as high as 140 and 150 a week and who were frequently paid more than the weekly guarantee. See Senate Hearings before Subcommittee of the Committee on Labor and Public Welfare, Fair Labor Standards Act Amendments of 1949, 81st Cong., 1st Sess., p. 23. There is nothing in the legislative history to indicate that adoption of the 60 hour limitation had any purpose other than to limit that decision, in response to criticism that the agreements there upheld illustrated the

all the intervening years even during the wartime period when there was no unemployment problem (see Pet. in No. 86, pp. 16–17), but is confirmed by recent proposals to reduce the workweek even further to 35 hours or 4 days in order to meet unemployment problems that might result from automation.

extremes to which *Belo*-type contracts could be carried even under the pre-existing limitations. To interpret this proviso as a repeal of all other pre-existing limitations is a distortion of its specific purpose.

Respondent's interpretation of the 60 hour limitation apparently stems from the erroneous supposition that Section 7 (e) was the outcome of conflicting proposals which included proposals to *expand* the *Belo* decision. But, as pointed out in our Reply in No. 86 (p. 10), the conflicting views did not pose the alternative of *expanding* the *Belo* decision, but at most simply of *preserving* its existing status.[7]

IV

Respondent's primary reliance in the court below upon the omission from Section 7 (e) of certain limitations proposed by the "Lesinski bill" (H. R. 5856) reflects a basic misapprehension as to the history of the Section 7 amendments as enacted. The contention is that since the Lesinski bill contained a

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[7] In this connection, it is noteworthy that the attorney for a large insurance company, engaged in the same type of business as respondent, was among those, who shortly after the enactment of Section 7 (e), specifically expressed the view, in a widely circulated publication, that the 1949 Amendments did no more than approve agreements under the same conditions upheld in the *Belo* case, leaving them subject to the same limitations. See *A "Belo" Primer for 1950*, by William Conant Brewer, Jr., Labor Law Journal, November 1949, p. 94. After reviewing at length the court decisions bearing on *Belo*-type contracts, the author concludes (at p. 160):

"In the *Belo* case, the guarantee was exceeded in about twenty percent of the weeks worked. The court looked upon this as evidence of good faith in the setting of the regular rate, *and it is unlikely that a guarantee which is never exceeded will be upheld, even under the statute.*" [Emphasis added.]

limitation specifically requiring that the number of hours covered by the weekly guarantee should bear "a reasonable relationship to the range of hours customarily worked during a representative period of time," the abandonment of the Lesinski bill in favor of the "Lucas bill" was tantamount to a rejection of this limitation. There are two basic fallacies in this argument.

In the *first* place, the provision of the Lesinski bill related to contracts providing an "hourly rate of pay;" it did *not* use the term "regular rate of pay" and thus did not incorporate the definition of that term as contained in the present Section 7 (d). (The Lesinski bill provision was numbered Section 7 (c) and preceded the subsection defining the term "regular rate.") Since the Lesinski bill used only the term "hourly rate of pay," it was necessary to spell out the details of the limitations governing the agreed hourly rate. On the other hand, the more concise Section 7 (e) of the Lucas bill was placed immediately following the definition of the term "regular rate," and since it used the specific term which had already been comprehensively defined in the preceding subsection (d), there was no need for the detailed language of the Lesinski bill. For, as we have shown in the Reply Memorandum in No. 86 (pp. 14–24), the requirements of Section 7 (d) necessarily include the limitation of a reasonable relationship to the employee's actual working hours.

In the *second* place, the replacement of the Lesinski bill reflects no specific legislative intent with respect to this one provision. Both bills were lengthy, compre-

hensive bills, comprising some 40 pages or more, and containing numerous amendments to the Fair Labor Standards Act, including, *inter alia,* amendments to the minimum wage and coverage provisions and to numerous exemption provisions. The Section 7 provision was simply one section of the lengthy bills. Whatever basis there might have been for inferring a specific purpose to reject limitations in Section 7 (c) of the Lesinski bill if the two bills had been concerned solely or primarily with that particular provision, the substitution of the whole Lucas bill for the equally general all-inclusive Lesinski bill is, of itself, hardly indicative of the specific intent which respondent infers with respect to this one provision. And the legislative debates, far from showing that the substitution had any significance so far as Section 7 (e) is concerned, negative respondent's contention. This is evident not only from Congressman Lucas' own statement of the limited scope of Section 7 (e) (see Pet. in No. 86, pp. 13–14), but also from the complete absence in the lengthy debates on the entire bill of any suggestion, from anyone, that an expansion of the *Belo* decision was contemplated. Thus, in explaining the differences between the two bills, Representative Lesinski emphasized only the differences in coverage and minimum wage provisions, and did not even mention the differences in the provisions relating to *Belo*-type contracts. (95 Cong. Rec. 10998, *et seq.*). The ensuing general debate emphasizes that the differences between the two bills to which Congress attached significance were, not the differences in the *Belo* provision, but the differences in coverage, mini-

mum wage, various exemptions, rule-making power, and in fact, almost everything *except* the difference in the provisions on *Belo*-type contracts.

Under these circumstances, the mere substitution of the Lucas bill with its more general phraseology of the *Belo* contract provision—a provision which in itself provoked virtually no discussion—can scarcely be regarded as evidence of Congressional rejection of the more detailed safeguards (based on this Court's decisions subsequent to *Belo*) spelled out in the corresponding provision of the Lesinski bill. Such an inference is particularly unwarranted in view of the retention in Section 7 (e) of the terms "bona fide" contract and "regular rate of pay" which are the terms construed by the very precedents which the decision below assumes Section 7 (e) repudiated by implication.

CONCLUSION

In view of these considerations, together with the reasons set forth in the petition and reply memorandum filed in No. 86, we respectfully submit that the petition should be granted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
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IRVING J. ALTER,
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Department of Labor.

OCTOBER 1956.

Appendix A

United States Court of Appeals for the Second Circuit

No. 168—October Term, 1955

(Argued January 18, 1956. Decided July 20, 1956)

Docket No. 23739

James P. Mitchell, Secretary of Labor, plaintiff-appellant

v.

The Hartford Steam Boiler Inspection and Insurance Company, defendant-appellee

Before: Medina, Hincks and Waterman, *Circuit Judges.*

Appeal by the Secretary of Labor from a judgment of the United States District Court for the District of Connecticut, Smith, J., dismissing his complaint against the Hartford Steam Boiler and Insurance Co. Affirmed.

Stuart Rothman, Solicitor, Bessie Margolin, Assistant Solicitor, Harry A. Tuell, Attorney, U. S. Dept. of Labor, Washington, D. C., Thomas L. Thistle, Regional Attorney, *for plaintiff-appellant.*

Lucius F. Robinson, Jr., John M. Donahue, Hartford, Conn. (Robinson, Robinson & Cole, Hartford, Conn., of counsel), *for defendant-appellee.*

DARK PAGE BLEED THRU

Cyril Coleman, C. Duane Blinn, Hartford, Conn., *attorneys for Aetna Life Insurance Company, amicus curiae.*

WATERMAN, *Circuit Judge:*

This action, involving the validity under § 7 (e) of the Fair Labor Standards Act, 29 U. S. C. (1952 ed.) § 207 (e), of guaranteed wage contracts of the so-called *Belo* type, was brought by the Secretary of Labor to enjoin the Hartford Steam Boiler Inspection and Insurance Co. (hereafter "Hartford") from violating the overtime provisions of the Fair Labor Standards Act, 29 U. S. C. § 201 *et seq.* The United States District Court for the District of Connecticut dismissed the Secretary's complaint on the ground that defendant's guaranteed wage contracts were not in violation of § 7 (e) of the Act, and the Secretary appeals.

Hartford is a Connecticut corporation engaged in the casualty insurance business, primarily the insuring of steam boilers, pressure vessels, and machinery. It employs approximately 600 inspectors, whose duty it is to determine the initial and continuing suitability of boilers, machinery, etc. for insurance. The duties of these inspectors necessitate irregular hours of work, typically fluctuating between 35 and 50 hours per week. Since 1950 Hartford has paid its inspectors under individual guaranteed wage contracts providing for an hourly rate of pay for the first 40 hours in each work week, time and one-half for each hour over 40, and a weekly guarantee of an amount equivalent to the amount payable if 60 hours were actually worked. Each inspector was notified by a form letter accompanying his contract that it was not contemplated that he would have to work more than 60 hours in any work week, and each employee was required to get company authorization before doing so. In

actual practice, only one quarter of 1% of the work weeks over a two-year period exceeded 60 hours. The District Court found that the hours worked "were expected to fluctuate but to be kept below 60 hours in all but the most exceptional cases."

The sole issue raised by this appeal is whether a guaranteed wage contract complies with § 7 (e) of the Act, 29 U. S. C. § 207 (e), even though the employees subject to that contract do not work a number of hours in excess of the guarantee period specified in the contract in a "substantial proportion" or "significant number" of work weeks.[1] The Secretary, relying primarily on the judicial interpretation of "regular rate" prior to 1949, when the Act was extensively revised and § 7 (e) added, contends that the phrase "regular rate of pay" in § 7 (e) impliedly incorporates the "substantial proportion" requirement; Hartford disagrees. To resolve the issue, we must refer to the words of the statute, its purpose and history, and the cases construing it.

The basic overtime pay requirement of the Act is contained in § 7 (a).[2] It expresses the employer's

[1] The Secretary does not question the bona fides of the contract, the irregularity of the hours worked by the inspectors, and the sufficiency or accuracy of the records kept by Hartford. Hartford, however, contends that its inspectors are exempt from the coverage of the Act as administrative employees under § 13 (a), 29 U. S. C. § 213 (a). The Secretary replies that that question cannot be raised here because no cross-appeal was taken. Because of the view we take as to the validity of Hartford's guaranteed wage contracts, it is unnecessary for us to decide either the merits of this question or whether the issue can properly be raised by Hartford without a cross-appeal.

[2] "SEC. 7(a). Except as otherwise provided in this section, no employer shall employ any of his employees * * * for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U. S. C. (1952 ed.) § 207 (a).

obligation in terms of a duty to pay for overtime not less than one and one-half times "the regular rate at which he is employed." The term "regular rate" was not defined in the original Act, nor was any reference made to guaranteed wage contracts. This absence of precise statutory criteria necessarily left to the courts the problem of giving content to the statutory language and of defining the limits within which employers and employees might establish basic and overtime rates by contract. The Department of Labor, which has consistently opposed guaranteed wage plans, initially took the position that any wage plan which did not reflect the actual hours worked in each workweek was invalid. However, this position was rejected by the Supreme Court in *Walling* v. *A. H. Belo Corporation*, 1942, 316 U. S. 624, and guaranteed wage contracts of the type now sanctioned by § 7 (e) were held valid. *Walling* v. *Belo Corporation, supra; Walling* v. *Halliburton Oil Well Cementing Co.*, 1947, 331 U. S. 17. Other Supreme Court cases, while accepting *Belo* as an exception to the usual rule, tended to narrow its application. *Walling* v. *Helmerich & Payne*, 1944, 323 U. S. 37; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 1945, 325 U. S. 419; *Walling* v. *Harnischfeger Corporation*, 1945, 325 U. S. 427; *149 Madison Ave. Corporation* v. *Asselta*, 1947, 331 U. S. 199; *Bay Ridge Operating Co.* v. *Aaron*, 1948, 334 U. S. 446. The Courts of Appeals, confronted by an exception of uncertain scope, evolved different criteria with the result that each case turned "pretty much on its particular facts." *McComb* v. *Roig*, 1 Cir. 1950, 181 F. 2d 726, 727; cf. *McComb* v. *Pacific & Atlantic Shippers Ass'n*, 7 Cir. 1949, 175 F. 2d 411; *McComb* v. *Utica Knitting Co.*, 2 Cir. 1947, 164 F. 2d 670.

It was against this background of uncertainty that Congress, as part of an extensive revision of the Act of 1949, enacted the present § 7 (e).[5] Section 7 (e) represents a codification of the previous case law only to the extent that it constitutes an express recognition of the validity of guaranteed wage contracts, limited in their use to employees who must work irregular hours and subject to the requirement that the contract be a "bona fide individual contract" or "an agreement made as a result of collective bargaining." The only express limitation on the contract guarantee of pay is that it be "for not more than sixty hours." There is no requirement expressed in the section that there be any sort of relation between that guarantee and the number of hours actually worked.

The Secretary, however, contends that the use of the term "regular rate" in § 7 (e) was meant to incorporate the pre-1949 judicial interpretation of that term, and that these pre-1949 cases establish that specified hourly rates are not "regular rates" unless they have actually received significant or substantial use in determining amounts to be paid to employees. Since the specified hourly rates are only operative when the employees work hours in excess of those guaranteed

[5] "SEC. 7 (e). No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides for a weekly guaranty of pay for not more than sixty hours based on the rates so specified." 29 U. S. C. (1952 ed.) § 207 (e).

in the contract, this is an assertion that a guaranteed wage plan can only be valid if the employees who are subject to the contract work a number of hours in excess of the guarantee period in a "substantial proportion" or "significant number" of workweeks. For the reasons stated below, we think the Secretary's contention that Congress intended to impose a "significant number of workweeks" test on guaranteed wage plans, which in all other respects comply with § 7 (e), is an incorrect interpretation of the Act.

First, the pre-1949 decisions indicate that the law as to guaranteed wage contracts under § 7 (e) was unclear and unsettled. The two Supreme Court cases upholding the validity of guaranteed wage contracts, *Walling* v. *Belo Corporation, supra,* and *Walling* v. *Halliburton Co., supra,* give no indication that the Supreme Court had adopted the "significant number of workweeks" tests as a criterion of validity. In *Belo* the Court adverted to the fact that the employees, on occasion, exceeded the guarantee period and that in such weeks they received more than the guaranteed wage, but no weight was accorded that fact, and no attention was paid to the number of workweeks in which the guarantee was exceeded. In *Halliburton* the Court noted that the guarantee was exceeded "in about 20 per cent of the workweeks," but there is nothing to warrant a conclusion that the Court had established the requirement that there be a relationship between the number of hours for which pay is guaranteed and the number of hours customarily worked.

The decisions of lower federal courts illustrate the unsettled state of the law. Two Courts of Appeals adopted the "significant number of workweeks" test advocated by the Department of Labor. *McComb* v. *Sterling Ice & Cold Storage Co.,* 10 Cir. 1947, 165 F.

2d 265, *McComb* v. *Roig,* 1 Cir. 1950, 181 F. 2d 726; a third Court of Appeals upheld a guaranteed wage plan even though the employees involved never exceeded the hours guaranteed, *McComb* v. *Pacific & Atlantic Shippers Ass'n,* 7 Cir. 1949, 175 F. 2d 411; and this Court upheld the validity of a guaranteed wage plan without reference to the number of workweeks in which the hours worked had exceeded the guarantee, *McComb* v. *Utica Knitting Co.,* 2 Cir. 1947, 164 F. 2d 670.

Second, the purpose and history of the enactment of § 7 (e) in 1949 indicates congressional unwillingness to adopt the test advocated by the Secretary. When the Fair Labor Standards Act was originally enacted in 1938, the nation was in a period "of widespread unemployment and small profit." *Overnight Motor Transp. Co.* v. *Missel,* 1942, 316 U. S. 572, 578. The major purposes of the Act were to eliminate long hours and to spread work by increasing the cost of overtime to employers. With the improvement of the national economy, the Supreme Court upheld the validity of a guaranteed wage contract, indicating that it would not give the Act a rigid application which would make impossible the attainment by employers and employees of other objectives fully as meritorious as the spreading of employment, stating: "Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance" and also: "When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to em-

ployees with irregular hours." *Walling* v. *Belo Corporation, supra,* at 635. The Department of Labor, strongly opposing this interpretation of the Act, attempted to obtain judicial[4] and then legislative reversal of the *Belo* doctrine. Many employer and employee groups, however, favored *Belo* and advocated legislative approval and expansion. During 1949, when revision of the Fair Labor Standards Act was being considered, these conflicting views were placed before Congress in the form of bills which would have: (1) expressly outlawed guaranteed wage contracts; (2) permitted their use, but subject to specific limitations including a "significant number of workweeks" test; or (3) permitted their use, without limitation as to the relation between hours worked and hours guaranteed. Congressional adoption of the third alternative in preference to the first or second alternatives which were advocated by the Department of Labor suggests that Congress favored *Belo* contracts and that it did not intend to limit their use in the manner suggested by the Secretary.

Other factors reinforce this conclusion. The inclusion of certain express limitations on the use of guaranteed wage contracts in § 7 (e) indicates that other limitations, not expressly stated, were not intended. And the precise statement in § 7 (f) (3) of a requirement similar to that contended for by the Secretary with respect to § 7 (e) supports a similar inference. Finally, the confusing state of the case law makes it unlikely that Congress intended to incorporate a "significant number of workweeks" requirement by the indirect method of including in § 7 (e) the phrase

[4] In *Walling* v. *Halliburton Oil Well Cementing Co.*, 1947, 331 U. S. 17, 25, the Administrator of the Wage and Hour Division, Department of Labor, contended that *Belo* had been wrongly decided. This contention was rejected by the Supreme Court.

"regular rate." Congress could hardly have found a less precise way to express such an intention.

Third, the judicial interpretation of § 7 (e) is contrary to the position advocated by the Secretary. In *Tobin* v. *Little Rock Packing Co.,* 8 Cir. 1953, 202 F. 2d 234, a guaranteed wage plan was upheld even though the employees *never* exceeded the guaranteed number of hours.[5] And recently the First Circuit has rejected the Secretary's argument in a persuasive and comprehensive opinion by Chief Judge Magruder. *Mitchell* v. *Brandtjen & Kluge, Incorporated,* 1 Cir. 1955, 228 F. 2d 291, aff'g D. Mass. 1955, 129 F. Supp. 675. We entirely agree with the reasoning and conclusion contained therein.

Judgment affirmed.

United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of July one thousand nine hundred and fifty-six.

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[5] To the same effect is *Mitchell* v. *Adams,* M. D. Ga. 1955, 129 F. Supp. 377. The Secretary relies on the following cases as demonstrating judicial recognition under § 7 (e) of the "significant number of workweeks" test: *Sikes* v. *Williams Lumber Co.,* E. D. La. 1954, 123 F. Supp. 853; *Tobin* v. *Aronow,* D. Mont. 1951, 96 F. Supp. 279; *Tobin* v. *Morristown Poultry Co.,* E. D. Tenn. 1952, 21 CCH Labor Cases, Par. 66, 798; *Tobin* v. *Keystone Mfg. Co.,* W. D. Ark. 1952, 21 CCH Labor Cases, Par. 66, 911; *Tobin* v. *Wenatchee Air Service, Inc.,* E. D. Wash. 1952, 21 CCH Labor Cases, Par. 67,019; *Tobin* v. *Eurbank Motor Freight Lines, Inc.,* W. D. Tenn. 1952, 23 CCH Labor Cases, Par. 67,411. We think these cases are either erroneous or distinguishable on their facts.

Present: Hon. HAROLD R. MEDINA, Hon. CARROLL C. HINCKS, Hon. STERRY R. WATERMAN, *Circuit Judges*

JAMES P. MITCHELL, SECRETARY OF LABOR, ETC., PLAINTIFF-APPELLANT,

v.

HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

By RALPH C. CURCIO,
Deputy Clerk.

Appendix B

STATUTORY PROVISIONS

Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C. 201):

SEC. 7* [63 Stat. 913].

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

*(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks, or

*(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two

* Single asterisk (*) indicates amended provisions; double asterisk (**) indicates new provisions (as amended in 1949).

consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of forty hours in the workweek or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Secretary of Labor to be of a seasonal nature,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

**(d) As used in this section the 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

**(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

**(2) payments made for occasional periods when no work is performed due to vacation,

holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

**(3) sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulation which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Secretary) paid to performers, including announcers, on radio and television programs;

**(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan, for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

**(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or forty in a workweek or in excess of the employee's normal working hours or regular working hours, as the case may be;

*(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

*(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

**(e) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

**(f) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if, pursuant to an agreement or under-

standing arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of forty hours—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during non-overtime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during non-overtime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Secretary of Labor as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time; and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (d) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

*(g) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (d) shall be creditable toward overtime compensation payable pursuant to this section.

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JOHN T. FEY, Clerk

NO. 513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

JAMES P. MITCHELL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE HARTFORD STEAM BOILER INSPECTION AND
INSURANCE COMPANY, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 20a-29a) is not officially reported (12 WH Cases 498). The opinion of the Court of Appeals is reported at 235 F. 2d 942.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTION PRESENTED

Does Section 7(e) of the Fair Labor Standards Act, as amended, require that there be a reasonable relationship between the number of hours for which pay is guaranteed

under individual guaranteed wage contracts and the number of hours customarily worked by the employees paid under such contracts?

STATEMENT

On February 10, 1942, the United States Labor Department ruled that the insurance business was subject to the Fair Labor Standards Act (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. sec. 201 *et seq.*). Thereupon, and repeatedly over the following four years, exhaustive investigations were conducted by the Wage and Hour Division at several of the respondent's offices in various states, as a result of which the respondent's inspectors were held to be exempt from the provisions of the Fair Labor Standards Act as administrative employees (Sec. 13(a)(1)). However, as a result of a later investigation, begun in 1946 at the respondent's Chicago Branch Office, these rulings were reversed and the inspectors were held not to qualify as administrative employees on the ground that they did not exercise sufficient independent judgment and discretion. Respondent sought to resolve the confusion thereby created by seeking a decision from the Administrator in Washington and after protracted negotiations, conferences and briefs, the latter on September 7, 1950 concluded that these employees were not exempt for the reason above stated.

At about this time the Act was amended *inter alia* to permit, specifically, guaranteed wage contracts with employees whose duties necessitated irregular hours of work (Sec. 7(e)) . As the nature of the inspector's duties necessitated irregular hours of work, the respondent, though of opinion that its employees' duties were administrative, rather than submit to the loss of time, expense and inconvenience involved in and the hazards of litigation, accepted

the ruling and entered into individual contracts with each of its inspectors, contracts which specified a regular rate of not less than the minimum permitted by the Act for the first forty hours, one and one-half times that rate for hours in excess of forty and provided a weekly guarantee of pay for sixty hours. In each case the contract followed the wording of the statute and in each case the specified rate in the contract bore a logical and reasonable relationship to the guaranteed wage, the rate being that required to produce the agreed compensation on the basis of a sixty-hour workweek.[1]

But this action on respondent's part was far from satisfactory to the petitioner. A series of investigations was conducted at the respondent's home office, employment records of all inspectors were minutely examined and innumerable conferences held in which petitioner insisted that, despite the fact that the number of hours in any workweek could never be determined with any certainty being dependent solely on fortuitous circumstances wholly beyond the control of the respondent and its employees, the guarantee in each contract should nevertheless be fixed at a number of hours which would be exceeded in a "significant" number of weeks, significant number in the view of the petitioner

[1]Contrast the situation in *McComb* v. *Roig*, 181 F. 2d 726 (1st Cir. 1950), heavily relied on by petitioner in his brief and argument both in the District Court and in the Court of Appeals. In that case all employees were listed at the same hourly rate of 47¢ but their weekly guarantees varied from $24 to $40. There was no logical or reasonable relationship between the weekly guarantee and the specified hourly rate and thus the latter was merely an artificial contrivance which did not set the regular rate at which the employee was employed. Furthermore, when employees from time to time received wage increases in the form of increases in their weekly guarantee the hourly rate remained unchanged.

being 20%. This proposal was wholly unsatisfactory not only to the respondent but to its employees, all of whom desired a stable wage and none of whom, though they were permitted to do so under Section 16(b) of the Act, sought to upset their contracts. Petitioner thereupon, taking up the cudgels for these satisfied employees, instituted suit in the District Court for the District of Connecticut seeking to enjoin respondent from an alleged violation of the Act on the ground that the rates specified in the contracts were fictitious because the guarantee was so seldom exceeded. Respondent answered that the contracts conformed in all respects to the requirements of Section 7(e) and further that the employees in question, performing administrative duties, were exempt from its provisions in any event. The District Court ruled the contracts in conformity with the Act and therefore valid. With respect to exemption, however, while the Court agreed with respondent that sufficient independent judgment and discretion were exercised by the employees to gain administrative status (petitioner's long insistence to the contrary notwithstanding), it found nevertheless that certain other highly technical criteria established by the administrative regulations precluded such classification. The Court of Appeals affirmed the judgment dismissing the action. It did not, however, rule on the exemption issue, a determination in respect thereof being unnecessary.

In his petition for certiorari the petitioner, who heretofore has relied primarily on a construction of this Court's decisions rendered prior to the 1949 amendments and allegedly incorporated therein, a construction which circuit after circuit has held incorrect, now shifts his emphasis and seeks to engraft on the clear and unambiguous language of Section 7(e) a refinement on the meaning of the term "regu-

lar rate" utilizing as his weapon therefor a definition of this term set forth in Section 7(d). He bolsters this effort with claims having no support in the record, viz., that unemployment was rife at the time of the amendments, that the use of guaranteed wage contracts has become commonplace in a wide variety of occupations. He sprinkles his argument with a liberal use of such words as "evasive" and "fictitious", and endeavors to escape from Section 7(e)'s legislative history by involved reasoning which serves only to compound the confusion which Congress sought to eliminate.

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT ISSUE

1. There is no conflict in the Courts of Appeals on the question now before this Court.

Each Court of Appeals which has ruled on the question, viz., the 8th, 1st, 5th and 2d Circuits, has rejected petitioner's argument that the use of the term "regular rate" in Section 7(e) was intended by Congress to impose a limitation on the use of guaranteed wage contracts and to restrict their validity to situations where employees work a number of hours in excess of the guarantee period in a "substantial portion" or "significant" number of work weeks. *Tobin* v. *Little Rock Packing Co.*, 202 F. 2d 234 (8th Cir. 1953), cert. den. 346 U. S. 832 (1953); in this case no employee ever exceeded the guarantee. *Mitchell* v. *Brandtjen & Kluge, Inc.*, 228 F. 2d 291 (1st Cir. 1955); "It would * * * be unwarranted judicial legislation on our part to read into Section 7(e) another requirement (significant number of workweeks) which the Congress chose not to put there". *Mitchell* v. *Adams*, 230 F. 2d 527 (5th Cir. 1956); "This (petitioner's claim) misreads both the *Belo* decisional law and the specific 1949 Amendment and is again the

search for handy, arbitrary, rule-of-thumb criteria, displacing inquiry and deliberative judgment, leaving it all to the wisdom of the Administrator". And *Mitchell* v. *Hartford Steam Boiler Inspection and Insurance Co.*, 235 F. 2d 942 (2d Cir. 1956). "We think the Secretary's contention that Congress intended to impose a 'significant number of work weeks' test on guaranteed wage plans, which in all other respects comply with Section 7(e), is an incorrect interpretation of the Act."

2. There is no conflict between the foregoing decisions of the Courts of Appeals and the decision of this Court rendered prior to the amendment.

This Court on only two occasions has ruled on the validity of guaranteed wage contracts. Both decisions predated the 1949 amendments and both upheld their validity. *Walling* v. *Belo Corp.*, 316 U. S. 624 (1942) and *Walling* v. *Halliburton Co.*, 331 U. S. 17 (1947). In neither case did this Court adopt or approve the so-called significant number of workweeks test which petitioner urges as the criterion of validity. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572 (1942), handed down on the same day as the *Belo* decision, established the standard definition of the term "regular rate", namely, compensation earned divided by the number of hours worked to earn it. But this "regular rate" is not the same as the regular rate which this Court in *Belo* said could be specified by a guaranteed wage contract. The field of guaranteed wage contracts has always constituted a recognized exception to this general concept of regular rate and the various Supreme Court cases cited by petitioner, viz., *Walling* v. *Helmerich & Payne,* 323 U. S. 37 (1944); *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419 (1945); and *Walling* v. *Harnischfeger Corp.*,

325 U. S. 427 (1945), all recognized *Belo* as an exception to the usual rule and did no more than narrow its application. In none of them, as in this case, was a guaranteed wage contract of the *Belo* type involved.

3. The clear-cut language of Section 7(e) and its legislative history establish beyond peradventure the validity of the Court of Appeals' construction.

In 1949 Congress considered the matter of revision of the Fair Labor Standards Act. Before it were three bills: (1) expressly outlawing guaranteed wage contracts, (2) permitting their use subject to specific limitations including a "significant number of workweeks" test (the Lesinski Bill), and (3) permitting their use without limitation as to the relation between hours worked and hours guaranteed (the Lucas Bill). The adoption of the third alternative *strongly opposed by the Department of Labor* in preference to the first or second *strongly advocated by the Department* clearly indicates Congressional approval of guaranteed wage contracts without the limitation urged by petitioner. Despite this violent opposition to the Lucas Bill and strenuous advocacy of the Lesinski Bill, petitioner now says in effect that the two bills mean the same thing and in support of this inconsistency urges:

First, that because the Section 7 amendments were such a small part of both bills no inference should be drawn from the rejection of the Lesinski Bill. Small part or no, Congress was abundantly aware of the case law, the confusion therein, and the need for clarification. And, petitioner's statement to the contrary notwithstanding, the divergent provisions as to guaranteed wage contracts in the two bills were discussed, and debated,[2] and the Depart-

ment's favorite, the Lesinski Bill, rejected—in sum a clear rejection of the Department's unwise effort to limit the validity of guaranteed wage contracts by imposing indefinite and impractical standards.

Second, that the use of the phrase "regular rate of pay" in Section 7(e) made it unnecessary to spell out the specific limitations included in the Lesinski Bill. This is based on the argument, fallacious on its face, that the definition of "regular rate" in Section 7(d) is applicable to Section 7(e). Section 7(d) defines "the 'regular rate' at which an employee is employed" to include all remuneration paid except payments made for "occasional periods when no work is performed . . . ." In the next breath petitioner says that in only 20% of the workweeks must the guarantee be exceeded, leaving 80% of workweeks when it may not. Thus in four out of every five weeks the regular rate may include remuneration paid for periods when no work was performed. We find it difficult to apply to this situation the adjective "occasional".

The simple answer is that the term "regular rate" as defined in Section 7(d) is not the regular rate that the parties may specify by contract under Section 7(e). If the Section 7(d) definition is applied in a situation where there is a constant guaranteed wage and a varying number of hours in the workweek, the resultant "regular rate" would vary from week to week. In contrast the regular rate which may be specified under Section 7(e) remains constant.

It is high time that petitioner recognize what has long been recognized by the courts that the field of guaranteed

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[2] 95 Congressional Record 11445 (August 10, 1949); 95 Congressional Record 12588 (August 27, 1949).

wage contracts is "one which constitutes an exception to the usual rule".[3]

4. Petitioner's interpretation of Section 7(e) precludes the wage stability sought and desired by employer and employee alike.

In the *Belo* case this Court noted the problems confronting employer and employee in businesses where work hours fluctuate from week to week stating:

> "Many such employees value the security of a regular weekly income * * *. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours." See 316 U. S. 624, at 635.

This latter objective underlay the enactment of Section 7(e) but despite the clear Congressional purpose the Department of Labor has continued to take a position which in the language of *Belo* "as a practical matter eliminates the possibility of steady income to employees with irregular hours". As heretofore stated, under the Department's regulations a level income for an employee who works irregular hours can be attained, at most, only 80% of the time.

And the Department would hedge in even this limited benefit by other requirements so onerous that only the unusual employer would attempt to comply with the regulations. For example, an employer has the obligation to guess in

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[3] *McComb* v. *Utica Knitting Co.*, 164 F. 2d 670, 673 (2d Cir. 1947).

advance what hours his employees will work (this is so even though he is not permitted to use the contract at all unless his employees' duties are such that hours of work cannot accurately be predicted in advance). This guess, however honest, may prove entirely inaccurate if a change in business conditions or an unexpected emergency causes a change in working hours. Thus, no employer can ever be sure in advance whether his use of a guaranteed wage contract would be in violation of the Act. Since the Department will always have the advantage of hindsight in evaluating the employer's guess, the use of such a contract under the regulations will necessarily be at the employer's peril. Obviously the advantages of a guaranteed wage contract, namely a level income for the employee and predictability of labor costs for the employer can be realized only if the guaranteed period is considerably in excess of the average workweek. As the guaranteed period and the average workweek are brought closer together the advantages of the contract steadily decrease.

Furthermore, compliance with the regulations would complicate the employer's bookkeeping problems to an unwarranted extent. Not only would he be required to make a detailed analysis of his time records before introducing the use of a guaranteed contract but under Department regulations these records must be reviewed "at least every six months" and the guarantee revised to conform to the employer's guesses based on such a review.[4] Since the Department apparently contemplates that each employee's situation shall be analyzed separately, the employer would not be justified in treating together a number of employees who do similar work as is the case with all of respondent's 600

[4] 29 C. F. R., Ch. V Part 778.18(f) Interpretative Bulletin on Overtime Compensation.

inspectors, this despite the fact that Section 7(e) expressly authorizes a collective bargaining agreement.

CONCLUSION

The clear and unambiguous language of Section 7(e) should put an end to further attempts to perpetuate the confusion which lies in the petitioner's "significant number of workweeks" test. Four Courts of Appeals have so ruled; no Court of Appeals has disagreed. We respectfully submit that the petition for a writ of certiorari should be denied.

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